SUBJECT INDEX

PAGE

Preliminary statement 2

Question presented 2

Statement of the case..... 3

Argument 8

I.

Petitioners' contention that the Supreme Court of Hawaii did not give weight to the testimony of petitioners' witnesses and to the findings of the trial judge is not supported by the record..... 8

II.

The object of the petition is to have this court interfere in a purely local matter of procedure..... 12

III.

The United States Court of Appeals for the Ninth Circuit correctly held that the Supreme Court of Hawaii did not commit manifest error in reversing the decision of the trial court 15

IV.

The decision of the Supreme Court of Hawaii was correct..... 17

Conclusion 18

Appendix:

Opinion of the Supreme Court of Hawaii.....App. p. 1

Decision on Appeal.....App. p. 19

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bank of Hawaii v. Char & Crozier, 40 Haw. 463	14
Bradbury v. Bradbury, 29 Haw. 638	13
Cha Fook et al. v. Lau Piu, 10 Haw. 308	13
Godfrey v. Kidwell, 15 Haw. 526	13
Hung C. Ching v. Fook H. Tong, 38 Haw. 617	13
John Ii Estate, Limited v. Brown, 235 U. S. 342	16
MacKenzie v. King, 30 Haw. 230	11
Manufacturers Life Insurance Co. v. Von Hamm-Young Company, 34 Haw. 288	13
Michigan Trust Co. v. Ferry, 228 U. S. 346	11, 15
Pinheiro v. Pinheiro, 32 Haw. 659	13
Robinson v. McWayne, 35 Haw. 689	13
Sumner v. Jones, 22 Haw. 391	13
Tevis v. Ryan, 233 U. S. 273	16
United States Fidelity & Guaranty Co. v. Vicars, 10 F. 2d 474	13
Waialua Agricultural Co. v. Christian, 305 U. S. 91	16, 18
Watumull v. Ettinger, 39 Haw. 185	11
Wilder v. Pinkham, 23 Haw. 571	13

TEXTBOOK	
5 Corpus Juris Secundum, Sec. 1662, p. 753	14

IN THE

Supreme Court of the United States

October Term, 1955

No. .....

WILLIAM G. MEAGHER and INDUSTRIAL DEVELOPMENT,
Petitioners,

vs.

EASTERN IRON AND METAL CO., LTD., and H. C. PATTERSON and PATTERSON CONSTRUCTION CO., LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief of Respondent, Eastern Iron and Metal Co., Ltd., In Opposition.

Your respondent, Eastern Iron and Metal Co., Ltd., herewith files its brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit filed by William G. Meagher and Industrial Development.

Respondent, Eastern Iron and Metal Co., Ltd., for convenience and unless otherwise noted will be referred herein as "Eastern," William G. Meagher as "Meagher," Industrial Development as "Industrial," H. C. Patterson as "Patterson," and Patterson Construction Co., Ltd., as "Patterson Corporation."

Preliminary Statement.

Respondent herein wishes to emphasize at the outset that petitioners do not appear to contend in their petition herein that the decision of the Supreme Court of the Territory of Hawaii, herein referred to as the "Supreme Court of Hawaii," insofar as said decision is based upon its own findings and its own interpretation of legal instruments, is manifestly erroneous, or that the findings of the Supreme Court of Hawaii are not supported by evidence. It is therefore the position of Eastern that the true question herein presented may be stated as follows:

Question Presented.

Where the Supreme Court of Hawaii in an equity case, pursuant to its power under Hawaiian law to independently weigh the evidence and to make its own findings thereon, does in fact formulate its own findings and make its own interpretation of legal instruments, contrary to those of the lower Territorial Court, should the decision be reversed notwithstanding:

(a) That the findings of the Supreme Court of Hawaii are amply supported by the evidence and petitioners do not contend to the contrary, and

(b) That petitioners do not contend that the decision of the Supreme Court of Hawaii herein complained of, insofar as said decision is based upon its own findings and its own interpretation of legal instruments, is manifestly erroneous or contrary to legal principles.

Statement of the Case.

On October 22, 1948, Eastern filed a bill in equity for injunction and other relief in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii. The bill alleged that on September 1, 1948, Patterson, representing Patterson Corporation, entered into a contract with Eastern for the sale and delivery to Eastern of 1500 tons of cast iron scrap metal located in Hawaii, F.O.B. rail cars, Los Angeles, at $50.00 per ton; that Eastern paid $35,000 in advance to Patterson Corporation as a partial payment thereon; that Meagher, Industrial, Patterson, and Patterson Corporation entered into a plan to defraud Eastern of said scrap and to convert same to their own use and in furtherance of their said plan said parties had diverted and were diverting the scrap to their own use [R. 3-16].

Following a trial of the issues, the Circuit Judge on April 19, 1949, found against Eastern and entered a decree dismissing the bill in its entirety [R. 50-56], from which decree Eastern appealed to the Supreme Court of Hawaii.

The Supreme Court of Hawaii, on April 25, 1952, in a lengthy opinion in which the testimony of the witnesses, including those of petitioner, Meagher, was discussed and analyzed, and the written instruments introduced at the trial interpreted, made its own findings and reversed the decision of the trial court. The decision of the Supreme Court of Hawaii was a unanimous decision and is re-

ported in 39 Haw. 346. A copy of this opinion and decision is set forth in the appendix to this brief and also in the record at pages 58 to 78. The Supreme Court of Hawaii found, *inter alia,* that Eastern had entered into the contract to purchase 1500 tons of cast iron scrap at the market price of $50.00 per ton and had paid $35,000.00 in cash as an advance payment thereon, said sum never having been returned or refunded; that a joint venture had been formed between Patterson Corporation and Industrial a month before the sale of the scrap to Eastern; that Patterson Corporation had transferred all of its scrap, of the approximate value of $97,158.10 to such joint venture; that the sale of the scrap iron to Eastern was a sale within the scope of said joint venture and was binding upon both said joint venturers; that neither such joint venturer ever had any intention of complying with the terms of the sale of the scrap iron to Eastern but on the contrary were acting to defraud Eastern by intentionally misapplying and converting cast iron scrap in contravention of the contractual rights and title of Eastern; that Meagher was liable for the furtherance of that fraud by also participating in the misapplication and conversion of such scrap as agent and sole representative in the Territory of Industrial if not its *alter ego* solely responsible for its breach, the Supreme Court of Hawaii holding Patterson, Patterson Corporation, Meagher and Industrial to be jointly and severally liable to Eastern for its damages. The decision of the Supreme Court of Hawaii concluded with its mandate as follows:

> "Accordingly, the interlocutory decree is reversed and the cause remanded below for further proceedings to determine the nature and extent of the appropriate, just and equitable relief to be granted to the petitioner (Eastern) by a final decree in its favor consistent with this opinion." [R. 77.]

Meagher and Industrial, petitioners herein, appealed to the United States Court of Appeals for the Ninth Circuit from this decision of the Supreme Court of Hawaii. Neither Patterson nor Patterson Corporation appealed to such court. That court affirmed the decision of the Supreme Court of Hawaii.

This is the first appeal referred to in the petition and is the only appeal to which petitioners' argument in their petition for writ of certiorari is directed (P. 4 of Pet.).

Following the decision of the Supreme Court of Hawaii on the first appeal and for the purpose of carrying into effect the mandate of the Supreme Court of Hawaii, no supersedeas bond having been filed by Meagher or Industrial, Eastern moved in the trial court for a partial decree in the amount of $35,000.00 and on September 17, 1952, the Circuit Judge entered a partial decree in that amount in favor of Eastern [R. 776-777].

The Circuit Court in said decree referred to the fact that the Supreme Court of Hawaii had found that Eastern was defrauded of $35,000.00 by petitioners herein, Meagher and Industrial, and by Patterson and Patterson Corporation, and that the issue of Eastern's right to recover this sum from such defendants was fully determined and no further proceedings were necessary as to that

issue [R. 776]. Meagher and Industrial appealed to the Supreme Court of Hawaii from said decree [R. 777-778].

The Supreme Court of Hawaii by opinion dated December 21 1953 [R. 791-796] affirmed that portion of the trial court's decree awarding Eastern $35,000.00, the Supreme Court saying:

> ". . . it is evident from the face of the record and from this court's prior opinion that the amount of damages assessed at $35,000 is the sum which the petitioner (Eastern) paid on the breached contract as a down payment and for which it has never been repaid or otherwise compensated. In correlation, a review of the record reveals that the uncontroverted evidence supports the decree in so far as it assesses the petitioner's (Eastern's) damages for breach of contract at $35,000." [R. 795.]

Petitioners appealed from this decision to the United States Court of Appeals for the Ninth Circuit, which Court, in the opinion appended to the petition, affirmed such decision. This is the so-called "Third Appeal" referred to in the petition and is referred to herein since the United States Court of Appeals disposed of this appeal in its said opinion and because the above-quoted language of the Supreme Court of Hawaii specifically shows that such Court once again reviewed the trial record and the evidence. Petitioners have not argued this appeal in their petition (See p. 4 of Pet.)

After the decision of the Supreme Court of Hawaii on the first appeal and while the appeal to the United States Court of Appeals from that decision was pending, petitioners, claiming to have discovered new evidence pur-

portedly resulting from alleged interviews between Meagher and the same persons who had testified at the trial, or between Meagher's Hawaiian counsel and such persons, such interviews having taken place over 3½ years after the trial, filed a number of motions in the United States Court of Appeals seeking a new trial and other relief. This so-called new evidence consisted of additional statements allegedly made by some of the same witnesses who had testified at the trial.

That Court remanded the cause to the Supreme Court of Hawaii for the limited purpose of permitting petitioners to file said motions in that court. Said motions were filed, briefed and argued and on May 29, 1953, by a *per curiam* decision of the Supreme Court of Hawaii reported in 40 Haw. 195 and appearing in the record at pages 758 to 761, dismissed the motion as being without foundation and without merit. Petitioners appealed to the United States Court of Appeals for the Ninth Circuit from the denial of such motions. That Court affirmed the decision of the Supreme Court of Hawaii denying such motions. The decisions and appeals pertaining to such motions are referred to herein since the United States Court of Appeals decided same in the one opinion appended to the petition herein, and also because the decision of the Supreme Court of Hawaii shows that such Court compared the testimony offered in the motions to that presented by the same witnesses at the trial, thus once again reviewing the record. This is the so-called "Second Appeal" referred to in the petition. Petitioners have not directed their argument to this appeal (Pet. p. 4).

ARGUMENT.

I.

Petitioners' Contention That the Supreme Court of Hawaii Did Not Give Weight to the Testimony of Petitioners' Witnesses and to the Findings of the Trial Judge Is Not Supported by the Record.

Petitioners contend that the Supreme Court of Hawaii did not give due weight to the opportunity of the trial court to see and hear witnesses or to the findings of the trial court, all of their other arguments flowing from this wholly unsupported and unwarranted premise.

This contention is not supported by any reference to the record. To the contrary it affirmatively appears from the record and from the opinion of the Supreme Court of Hawaii attached to this brief as an appendix that such Court did in fact carefully analyze and consider the evidence, written contracts and findings of the trial court and concluded that its ultimate duty to render a just decision required it to formulate its own findings and to reverse the decree of the lower court.

The manifest inequity of the trial court's decision is shown by the fact that such decision left Eastern not only without any portion of the scrap metal which it had purchased and for which it had obtained a bill of sale, but also left Eastern without the right to damages, including the sum of $35,000.00 which the Supreme Court of Hawaii found Eastern had theretofore paid on account of the purchase price of the scrap and which sum admittedly has never been returned to it.

Petitioners' contention that the Supreme Court of Hawaii did not give weight to the testimony of witnesses is, it is submitted, entirely unwarranted in view of the

detailed analysis and résumé thereof in its said lengthy opinion appended hereto, the greater part of which is devoted to a careful and detailed analysis of the written contracts and of the testimony, including that of petitioners' witnesses, Patterson and Meagher, and the testimony of Al Caplan, called as a witness by both sides. Petitioners called no other witnesses as to controverted matters. Upon reviewing the testimony of all of these witnesses and the documents the Supreme Court of Hawaii found that the undisputed evidence, *largely adduced by the petitioners themselves,* had proved the material allegations of Eastern's bill for relief in the trial court. The Supreme Court of Hawaii also found that Patterson, the main witness for Meagher and Industrial, had admittedly defrauded Eastern and that Meagher, a petitioner herein, had participated in the fraud.

The United States Court of Appeals carefully considered and rejected the contention of petitioners that the Supreme Court of Hawaii did not give weight to the trial Court's opportunity to see and hear the witnesses, the United States Court of Appeals stating, with respect to the reversal by the Supreme Court of Hawaii of the findings of fact and conclusions of law made by the trial Court that

> "This does not establish that the court (Supreme Court of Hawaii) gave *no* weight to the opportunity of the trial judge to see and hear witnesses. . . ." (Emphasis by the Court.) (P. iii of Appendix to Petition.)

Petitioners' contention that the Supreme Court of Hawaii ignored the trial Court's findings is entirely unwarranted. The opinion of the Supreme Court of Hawaii appended to this brief shows on its face that

such court carefully analyzed the subject matter of such findings, holding in effect that with two exceptions hereinafter noted such findings were either based on erroneous interpretations of the written instruments by the trial Court or were otherwise in error. The contention of petitioners that the Supreme Court of Hawaii ignored the trial Court's findings or was powerless to disregard same is especially incomprehensible in view of the fact that it appears from the face of the opinion of the Supreme Court of Hawaii in its decision on the first appeal appended to the petition herein that petitioners themselves contended in such appeal that the trial Court had erred in making two findings and tnat the Supreme Court of Hawaii should reverse such findings. As appears from the opinion of such Supreme Court, that court carefully considered said contentions and upheld such findings.[1]

Petitioners' contention that the Supreme Court of Hawaii was powerless to make findings contrary to those of the trial Court is not only contrary to Hawaiian law (see later portions of this brief) but overlooks the fact that the findings of the Supreme Court of Hawaii were based to a large extent upon its interpretation of two written contracts introduced by petitioners as embodying the terms of the oral joint venture agreement in effect at the time the scrap in question was sold to Eastern. The

---

[1]Petitioners herein contended in such appeal that the trial court erred in finding as it did that Eastern had no adequate remedy at law or that Eastern was entitled to sue in the Territorial Court. The Supreme Court of Hawaii discussed both of these contentions and said: "The first finding is patently a sound one under all the facts and circumstances of this case inclusive of the allegations in the bill itself. Likewise is the second under the principles enunciated by this court in *Cannell & Chaffin v. Deering*, 26 Haw. 74. . . ." [R. 77, and p. 17 of Appendix to this Brief.]

Supreme Court of Hawaii analyzed both of these agreements and interpreted each as authorizing the sale of the scrap as a binding obligation of the joint venture without the consent of the other joint venturer. While the trial Court interpreted these agreements differently, the Supreme Court was entitled to make its own interpretation of legal documents, such interpretation involving a question of law rather than fact.

Watumull v. Ettinger, 39 Haw. 185;
MacKenzie v. King, 30 Haw. 230.

It would appear to be manifestly absurd to argue that the interpretation of such legal instruments by a single judge during the heat of a trial should be accorded greater weight than the interpretation thereof by the unanimous decision of the Supreme Court of Hawaii after a careful and unhurried study and analysis of the instruments and a study of pertinent authorities, cited and referred to by the Territorial Supreme Court in its opinion.

It is therefore crystal clear that there is nothing in the record to support petitioners' contention that the testimony of their witnesses or the trial Court's findings were ignored or not considered.

The Statement in the opinion of the United States Court of Appeals upon which petitioners so heavily rely that "even assuming that such weight was not given and that prior Hawaiian decisions requires it, we cannot say that the Supreme Court lacks the power to overrule its prior decisions in the local law of procedure" is not only, it is submitted, a correct statement of the law (see *Michigan Trust Co. v. Ferry,* 228 U. S. 346, 354) but was merely an additional ground for the decision of affirmance.

II.

The Object of the Petition Is to Have This Court Interfere in a Purely Local Matter of Procedure.

Petitioners on pages 6 and 7 of their petition set forth the substance of the findings of the Territorial trial Court on some of the issues and the interpretation by that court of the written instruments claimed to have embodied the terms of the oral joint venture.

It should be noted that petitioners do not set forth the findings of the Supreme Court of Hawaii on these same or on any other issues or the interpretation by that court of such legal instruments. Nor do petitioners contend in their petition herein that the findings of the Supreme Court of Hawaii were not amply supported by the evidence or that the interpretation by that court of the two written joint venture agreements was incorrect. Indeed, petitioners do not even contend in their petition that the findings of the trial court were supported by the preponderance of the evidence.

It is apparent from an examination of the petition that petitioners' basic and indeed only real contention is, in essence, that since there was a conflict in the evidence, and irrespective as to where the preponderance of the evidence lay, that so long as the findings of the lower court were supported by "competent evidence", that the Supreme Court of Hawaii, irrespective as to the equities of the case or the injustice of the trial Court's decision, or the weight of the evidence, was powerless to make its own findings and reverse the case.

This contention ignores Hawaiian decisions as to the scope of review in equity cases decided both before and after the Organic Act and does not square with petitioners' own statement of the law, petitioners conceding, in their

petition, that "it is true that this was an equity case and hence the Territorial Court had the *naked* power to upset the findings of the chancellor . . ." (Pet. pp. 10-11).

A complete answer to petitioners' contention is found in the decisions of the Supreme Court of Hawaii hereinafter referred to.

The power of the Supreme Court of Hawaii in equity appeals to review the entire record, and even though the evidence is conflicting, to draw its own inferences therefrom and to make its own findings of fact as well as rulings of law, even though contrary to those of the trial Court, is well established.

Bradbury v. Bradbury, 29 Haw. 638, 640;
Pinheiro v. Pinheiro, 32 Haw. 659, 664;
Manufacturers Life Insurance Co. v. Von Hamm-Young Company, 34 Haw. 288, 303;
Wilder v. Pinkham, 23 Haw. 571, 572;
Robinson v. McWayne, 35 Haw. 689, 739;
Godfrey v. Kidwell, 15 Haw. 526, 531;
Hung C. Ching v. Fook H. Tong, 38 Haw. 617.

While on conflicting issues of fact the Supreme Court of Hawaii will give great weight to the findings of the trial judge, as the record, it is submitted, shows was done in this case, nevertheless it is well settled that such findings, even though based on conflicting evidence, are not binding on the Supreme Court.

Godfrey v. Kidwell, 15 Haw. 526, 531;
Robinson v. McWayne, 35 Haw. 689, 739;
Pinheiro v. Pinheiro, 32 Haw. 659;
Sumner v. Jones, 22 Haw. 391, 394;
Cha Fook et al. v. Lau Piu, 10 Haw. 308, 312;
U. S. Fidelity and Guaranty Co. v. Vicars, 10 F. 2d 474 (C. A. 9).

C. J. S., Vol. 5, Sec. 1662, p. 753 *et seq.* (Appeal and Error), containing a collection of cases, points out that in many American States, the appellate court in an equity appeal is not bound by the findings of the court below but may find the facts for itself.

None of the cases cited and referred to by petitioners on pages 11 to 13 inclusive of their petition hold that the Supreme Court of Hawaii is bound by the findings of the trial Court in an equity case or may not weight the evidence independently, notwithstanding that such Supreme Court will give great weight to the trial Court findings on conflicting evidence. Respondent has no quarrel with such authorities. Petitioners have failed utterly to show or to point to anything in the record to support their bald contention that the Territorial Supreme Court did not give due weight to the findings of the trial Court.

The very fact that the Supreme Court of Hawaii in *Bank of Hawaii v. Char & Crozier,* 40 Haw. 463 (Cited on p. 13 of Pet.), decided March 2, 1954, almost two years after the decision by that Court on the first appeal in this case, reaffirmed its rule that the findings of fact by the trial court (while not binding on the Territorial Supreme Court) will be given great weight, establishes the fallacy of petitioners' contention that an important principle is involved herein or that the Supreme Court of Hawaii changed its rule as claimed by petitioners.

III.

The United States Court of Appeals for the Ninth Circuit Correctly Held That the Supreme Court of Hawaii Did Not Commit Manifest Error in Reversing the Decision of the Trial Court.

As previously pointed out, petitioners do not in their petition contend that the findings of the Supreme Court of Hawaii were not amply supported by the evidence, or that the decision of the Supreme Court of Hawaii, insofar as it was based upon its own findings of fact was erroneous, or that the interpretation by such court of the legal instruments claimed to have embodied the terms of the oral joint venture was erroneous. Petitioners' contention appears to be that the Supreme Court of Hawaii was powerless to make its own findings in view of their claim that there was "competent evidence" to support the findings of the trial Court, and irrespective as to the equities of the case. It is submitted that under the authorities cited under point II this contention is not well founded and that therefor the United States Court of Appeals correctly affirmed the decision.

The refusal by the Court of Appeals for the Ninth Circuit to interfere in a matter involving the interpretation by the Territorial Supreme Court of its duties and responsibilities under Hawaiian law was thoroughly justified by decisions of this Court.

In *Michigan Trust Co. v. Ferry,* 228 U. S. 346, 354, this Court said:

> "It is a strong thing for another tribunal to say that the local court did not know its own business

under its own laws. Even if no statute or decision of the Supreme Court of the State is produced, the probability is that the local procedure follows the traditions of the place. . . ."

In *Tevis v. Ryan,* 233 U. S. 273, 291, this Court said:

"And we are not disposed lightly to disturb the decision of the Territorial Supreme Court (Arizona) turning so largely, as it does upon the local procedure."

See, also:

Waialua Agricultural Co. v. Christian, 305 U. S. 91;

John Ii Estate, Limited v. Brown, 235 U. S. 342.

Petitioners' contention that the decision of the Court of Appeals for the Ninth Circuit effectively repeals litigants' right to appeal from the Supreme Court of Hawaii is entirely without merit. Respondent has pointed out the fallacy of this argument above. In addition it should be noted that nowhere in their petition is it contended that the decision of the Supreme Court of Hawaii, *insofar as such decision was based upon its own findings and its own interpretation of legal instruments,* was erroneous and nothing in the record supports petitioners' contention that the Court of Appeals, in its decision, in any way limited its right to review decisions of such Supreme Court for manifest error.

IV.

The Decision of the Supreme Court of Hawaii Was Correct.

Meagher testified that with the exception of one provision not material here, the memorandum agreement dated July 22, 1948 [R. 348-351] embodied the terms of the oral joint venture agreement [R. 347-348]. The Supreme Court pointed out that this memorandum agreement did not contain any specific provision prohibiting one joint venturer from selling joint venture property without the consent of the other, the Court therefor holding applicable the rule that generally one joint venturer is empowered to sell and convey joint venture property if such sale is not expressly prohibited and the purpose of the joint venture is the sale of such property [R. 72, and p. 13 of Appendix hereto].

The Supreme Court pointed out that the sale of the scrap related to matters strictly within the scope of the joint venture, the very purpose of which was to acquire and sell scrap, the court saying that sales of scrap "fulfilled the very purpose for which the venture was created" [R. 73, and p. 14 of Appendix hereto].

Patterson testified in effect that the terms of the oral joint venture agreement were substantially the same as those contained in a written joint venture agreement executed after the commencement of the trial [R. 67]. The Supreme Court of Hawaii pointed out that this agreement specifically prohibited sales "at less than the prevailing market price" by one joint venturer "without the consent of the other." The Supreme Court held that the necessary implication of this provision was that sales of scrap at or above the prevailing market price by one joint venturer without the consent of the other was authorized,

the evidence being undisputed that the scrap involved i this litigation was sold to Eastern at the prevailing marke price.

The Supreme Court in so interpreting the written agree ments which formed the crux of the litigation applie settled canons of construction and referred to numerou authorities, all of which support the rules stated.

It is therefor submitted that not only was the decisio of the Supreme Court of Hawaii correct but that in n event can it be said that such decision was *manifestl* erroneous within the rule of the case of *Waialua Ag ricultural Co. v. Christian,* 305 U. S. 91.

Conclusion.

For the reasons herein stated it is respectfully sub mitted that the petition for a writ of certiorari should be denied.

Dated: Beverly Hills, California
December 8, 1955

Respectfully submitted,

A. Joseph Sherwood,

Samuel Sherwood,

Attorneys for Respondent, Eastern Iron and Metal Co., Ltd.,

A. Joseph Sherwood,

Of Counsel.

APPENDIX.

In the Supreme Court of the Territory of Hawaii, October Term, 1951. No. 2764.

Eastern Iron and Metal Co., vs. H. C. Patterson, Patterson Construction Co., Ltd.; William G. Meagher, Industrial Development, an Hawaiian (*sic*) Copartnership; John Doe One, John Doe Two and John Doe Three.

Appeal from Circuit Judge, First Circuit, Hon. P. L. Rice, Assigned Judge.

Argued February 19, 1952. Decided April 9, 1952.

Opinion of the Court by Le Baron, Jr.

Towse, *C. J.*, Le Baron and Stainback, *JJ.*

Corporations—liability—representation of corporation by officers and agents—apparent authority—to contract.

A president of a corporation has apparent authority to make a contract of sale in the name of the corporation so as to bind it, and the purchaser has the right to rely on that authority where the contract is made in the usual course and scope of the corporation's business as adopted by the corporation without dissent in prior transactions of a similar nature.

Joint adventures—rights and liabilities of parties to third persons.

Liabilities of joint adventurers are governed, in general, by rules which are similar or analogous to those which govern the corresponding liabilities of partners, except as they are limited by the fact that the scope of a joint venture is narrower that that of the ordinary partnership.

A sale by one joint adventurer within the scope and authority of the joint venture binds the other, whether disclosed or undisclosed, the knowledge of the one being

the knowledge of the other, and does so even though the one fraudulently purported to sell property as his own and the purchaser dealt with him as an individual.

Opinion

This is a bill in equity for injunction, establishment of constructive trust and incidental relief. Attached to it and made parts thereof are a written agreement for sale and delivery executed at Los Angeles, California, between the petitioner, a foreign corporation, as buyer, and the respondent, Patterson Construction Company, Limited, a Hawaiian corporation, as seller, and a supporting bill of sale contemporaneously delivered to the petitioner by that respondent. The terms of the agreement are that the respondent corporation warranted that it was "the owner * * * and in a position to convey title and possession" of 1,500 tons of cast iron scrap and agree to sell that cast iron scrap to the petitioner at the rate of $50 per ton to be delivered at Los Angeles by a certain steamship line, in consideration of which the petitioner agreed to purchase such scrap at that rate so delivered and to pay $35,000 in advance. The agreement recited that the "bill of sale transferring title as of this date for said merchandise" was delivered as evidence of the warranty expressed in the agreement or contract itself and that "Title is conveyed for the purpose of assuring performance of this contract, but the fact that title is so conveyed shall not affect the liabilities or responsibilities fixed upon the Seller [*i.e.*, the respondent corporation] by reason of the fact that the merchandise is being sold F.O.B. rail cars Los Angeles Harbor." The bill of sale, so delivered and so conveying title, described the 1500 tons of cast iron scrap sold as 600 tons thereof "now located at Waianae Sugar Mill, Oahu," and as 900 tons

"now located at Waimea Sugar Mill, Kauai, Territory of Hawaii." The bill for injunction alleges that the "Petitioner has in accordance with his contract paid to Respondent Patterson Construction Company, Limited, the sum of $35,000 in and for partial payment for said scrap cast iron."

As grounds for equitable relief, the bill alleges (1) that the respondent corporation "is insolvent and has no intention of complying with the terms of said contract or of delivering said merchandise" [*i. e.*, said cast iron scrap]; (2) that the respondent corporation and H. C. Patterson, its president, and respondent Industrial Development, a foreign copartnership, and William G. Meagher, its attorney in fact, "have entered into a plan to defraud petitioner of said merchandise and to convert same to their own use"; (3) that "in furtherance of their plan said Respondents are now in the process of loading said merchandise on a barge or barges * * * to be shipped to an unknown destination * * * [and of] mixing the cast iron scrap sold to Petitioner with other scrap so that the same cannot be identified" and have already done so in part; (4) that "if said scrap is converted as alleged, Petitioner will suffer irreparable damage"; (5) that "Petitioner does not have a complete, full and adequate remedy at law."

The relief prayed in the bill is (1) to require the respondents to show cause why they should not be permanently enjoined from shipping said merchandise to anyone other than to the petitioner at Los Angeles; (2) to issue a temporary restraining order restraining them from con-

veying, transferring, shipping, loading or encumbering any cast iron scrap until the title to the same has been determined judicially; (3) to impress a trust on said merchandise in favor of petitioner; (4) to set aside and cancel any sale of said merchandise made from respondent corporation to any of the other respondents; (5) to issue a mandatory injunction requiring respondent corporation to comply with the terms of said agreement and to give proper security therefore; (6) to order respondents to pay damages sustained by petitioner and his costs, and for such other and further relief as may be appropriate.

On the filing of the bill, a temporary restraining order and an order to show cause issued. After various returns, answers, motions to dissolve the temporary restraining order and other pleadings made by the respondents, the cause came to issue and on stipulation of the parties a trial on the merits was held. At the close of trial the presiding judge in equity, by oral decision and thereafter by interlocutory decree, dismissed the bill in its entirety and denied its prayer for equitable relief but reserved the question of damages which may have been suffered by the respondent copartnership pending disposition of the instant appeal, which the petitioner had indicated that it would take from that decree.

The specifications of error meriting consideration challenge the interlocutory decree and present five paramount and interdependent questions pertaining to the written warranty agreement for sale and delivery. The first question so presented is whether that agreement constitutes a valid and binding contract of sale and purchase upon the respondent corporation and the petitioner as parties thereto. The second is whether the sale made therein was

authorized by the terms of an existing oral agreement for joint venture which the respondent corporation had entered with the respondent copartnership. The third is whether the sale made by the respondent corporation to the petitioner was an exercise of such authority within the scope of the joint venture. The fourth is whether the respondent copartnership is bound by the contract made by the respondent corporation. The fifth is whether those respondents are in breach of contract, and if so, what is the nature thereof and the part played therein by the other respondents?

As to the first question, the written warranty agreement for sale and delivery on its face unquestionably meets every requisite of a valid and binding contract. The respondents claim that it does not bind the respondent corporation because that corporation did not expressly ratify the contract but, according to respondent Patterson's testimony, subsequently rejected it. They do not seriously claim, however, that the respondent Patterson, who signed the contract on behalf of the corporation as its president, did not have authority to bind the corporation to that contract. Nor could they reasonably do so under the undisputed evidence which shows that the contract was executed by the president of the corporation in the ordinary course of the corporation's business as had been adopted by the corporation without dissent in the past, such as in its prior transfer to the joint venture and dealings of a similar nature with the petitioner itself. That evidence establishes that the respondent Patterson, as president and chief administrative officer, had at least apparent authority, if not expressed or implied authority, to bind the corporation to the contract and that the petitioner had the right to rely on that authority. (For col-

lection of authorities see 13 Am. Jur. §890, p. 870.) Being so authorized, the contract did not require ratification. Admittedly, the act of the respondent Patterson was on behalf of the corporation in executing the contract and in perpetrating a fraud upon the petitioner. Under the undisputed evidence, that act as to both phases, assuming *arguendo* it be unauthorized, was impliedly ratified by the corporation when it accepted $35,000 on the contract and retained that money for a corporate expenditure and then rejected the contract without returning or repaying such money and without any intention of doing so. In any event, the respondents Patterson and corporation are estopped to deny the validity and binding effect of the contract. (See 2 Fletcher Cyc. Corp. [perm. ed.] §773, p. 826.) Nor can corporate liability be avoided on the contention that the respondent corporation was under duress because it was in desperate need of money and because the petitioner would not admit or pay what the respondent corporation claimed the petitioner owed it on a prior but separate and distinct transaction. The petitioner at all times consistently claimed that the respondent corporation owed it money on that transaction. At no time surrounding the instant contract did the petitioner threaten the respondent corporation but when pressed by the respondent Patterson merely exercised its legal right to deny the respondent corporation's assertion of prior claim and to assert one of its own, the presiding judge in his oral decision correctly pointing out that those conflicting claims are not susceptible of determination in this case but require an accounting beyond the issues thereof. The exercise of that right in no way affected the validity and binding effect of the contract or compelled the respondent Patterson, on behalf of the respondent corporation, to enter into that contract so as to constitute duress,

even though the corporation's financial distress may have been the motive for the perpetration of fraud upon the petitioner. Nor are there present in this case any of the concomitants of duress or any other elements of lack of good faith on the part of the petitioner as a bona fide purchaser. Thus, that contention of duress is untenable and so are the other contentions of the respondents in challenging, as they do, the validity and binding effect of the written contract by parol evidence contrary to its terms and in contradiction of its clear and unambiguous language. The first question is therefore answered in the affirmative.

As to the second question, the evidence is undisputed that respondent corporation and respondent copartnership, by oral agreement, entered into a continuing joint venture for the purchase, preparation and sale of scrap iron one month before the written agreement was executed and the supporting bill of sale delivered. The parties to the joint venture, however, intended that such oral agreement would be supplemented by a complete and formal agreement in writing at some time in the future and in the meantime would be subject to change. They entered into a written agreement for joint venture of that nature four days after the petitioner filed its instant bill in equity but dated it as of the date of the oral agreement. The terms of both agreements for joint venture prove the creation of the joint venture which existed at all times within the ambit of this case. The respondent corporation divorced itself from the scrap iron business by transferring to the joint venture all its scrap iron at the approximated actual value of $97,158.10 and the respondent copartnership contributed $115,000 in cash to the joint venture, the parties agreeing to share equally in the net profits and losses. Nevertheless, the terms of the

oral agreement, in so far as they authorize one joint adventurer to sell without the consent of the other, are in dispute between the respondent Meagher as attorney in fact for the respondent copartnership and the respondent Patterson as president of the respondent corporation.

Respondent Meagher testified in effect that the oral agreement for joint venture had been previously set forth in a written memorandum but that, by mistake, the name of a third party, a foreign corporation of which he was president, was substituted for that of the respondent copartnership of which he was attorney in fact, the mistake presumably arising from the inadvertent use of a form agreement. He further testified that such memorandum was regarded by the respondent parties as tentatively embodying the terms of their oral agreement until a complete and formal contract could be executed. The respondent copartnership introduced into evidence that written memorandum in which there is absent any specific provision prohibiting one joint adventurer from selling without the consent of the other. In the absence thereof, it is presumed that each co-adventurer was the authorized agent for the joint venture to sell as a transaction of the joint venture, despite the provision contained in the written memorandum that "Sole authority and responsibility for the operation of this Joint Venture shall be in a Committee composed of one (1) representative from each party to this agreement; and any and all decisions made by this Committee shall be binding on the parties to this agreement" where, as here, there is nothing to indicate a contrary conclusion and no evidence tending to show that such a committee was in existence or made any decision whatsoever. The testimony of respondent Meagher, so corroborated, is deemed to be better evidence

of the terms of oral agreement than the testimony of the respondent Patterson, who admittedly intended to defraud the petitioner. Indeed, had the mistake of party not been made the written memorandum would have been in lieu of the oral agreement or a reduction to writing of it. Under that view of the evidence, either joint adventurer was authorized to sell without the consent of the other and the patricular sale in question would be authorized, provided only that it was within the scope of the joint venture.

The respondent Patterson testified in effect that the terms of the oral agreement for joint venture were substantially the same as those in the subsequent written agreement which specifically prohibited sales "at less than the prevailing market price" by one party "without the consent of the other," the necessary implication being that sales at or above the prevailing market price by one party without the consent of the other were authorized. That specific provision controls, as the applicable provision, rather than the general provision against incurring "any indebtedness on behalf of the joint venture" or obligating "it in any way" by one party. Nor does the other general provision apply, which places "Sole authority and responsibility for the operation of the joint venture" in a committee and makes all its "decisions * * * binding on the parties" where, as here, there is no evidence tending to show, and the respondents have failed in their burden of proof to show, that such committee, if one existed and functioned, made any decision whatsoever. Pertinent to the application of the authority to sell at the prevailing market price under the necessary implication of such specific provision, the only evidence in the record of the prevailing market price at Los Angeles, the place of

delivery, at the time of sale for the particular type of cast iron scrap sold is the undisputed testimony of the president of the petitioner, an experienced dealer in scrap iron, that such prevailing market price at that place and time was $50 per ton, which is the rate of contract price set forth in the written agreement for sale and delivery. Thus, under that view to the same extent as under the other view, the sale in question would be authorized, it being at and not less than the prevailing market price and not requiring the consent of the other party under the terms of either the oral or written agreement for joint venture. The second question is therefore answered in the affirmative.

As to the third question, it is true that the respondent corporation, prior to its entry into the contract and delivery of the supporting bill of sale for 1,500 tons of cast iron scrap, had transferred all its scrap iron, inclusive of cast iron scrap, to the joint venture. But it is equally true that such respondent was then joint owner with the respondent copartnership of all the joint venture's scrap iron, inclusive of cast iron scrap so transferred or otherwise acquired, and, as already indicated, had the authority to sell that property or any part of it wherever located. It follows therefrom that the respondent corporation, being such joint owner, was "in a position to convey title and possession" as warranted, and exercised its authority within the scope of the joint venture when binding itself to the contract and bill of sale provided that the particular property involved constituted joint venture property. That property is specifically indentified by those documents to be 1,500 tons of cast iron scrap, which the bill further describes by locating 600 tons thereof at Waianae and 900 tons

at Waimea. Nor is that description disturbed or the expressed warranty vitiated by the fact, as later proved at the trial, that only 216 and 200 tons of cast iron scrap were actually located at those places at the time of sale to the petitioner. That fact, rather, goes to the question of breach of expressed warranty as to quantity. It is sufficient for the purpose of the question under consideration to decide whether the 416 tons of cast-iron scrap actually so located constituted joint-venture property.

The respondents admit that the evidence proves that the 216 tons of cast-iron scrap actually located at Waianae at the time of sale to the petitioner constituted joint-venture property, but they contend that the 200 tons at Waimea was then the property of a third party, as a part of his sugar mill, rather than the property of the joint venture. They further contend that those 200 tons never became property of the joint venture so as to be subject to sale to the petitioner. The undisputed evidence, however, does not show that the joint venture was so bypassed by the parties thereto with respect to such property. That property was a subject of transfer to the joint venture by the respondent corporation, even though that respondent was in the process of negotiating for its purchase and thereafter continued negotiations to purchase it for the joint venture but was financially unable to consummate such purchase. Nevertheless, during that period of negotiation the parties to the joint venture after the transfer treated the property as if it were joint-venture property. This is evidenced by the fact that during such period the joint venture itself dismantled the sugar mill, prepared the metal secured therefrom as cast-iron scrap, loaded it on a barge and shipped it. While in the course of being so handled by the joint

venture, but after the sale to the petitioner and notice of petitioner's claim, that property was purchased by the respondent copartnership in its own name when it became obvious that the respondent corporation was not able to purchase it for the joint venture. Under those facts and circumstances, the property in question at the time of sale to a third party by one joint adventurer is deemed to have been joint-venture property and its acquirement by the other deemed to have been made for the joint venture, it being immaterial that title was taken in the name of the purchasing joint aventurer, who is regarded as holding it as trustee for the joint venture. (See Cassidy v. Gould, 860 Okla. 217, 208 Pac. 780.) Thus, the 200 tons at Waimea at the time of sale to the petitioner constituted joint-venture property, even though the respondent copartnership thereafter may have had a joint-adventurer's lien upon it for its purchase price as against the respondent corporation but not as against the petitioner as an intervening third-party purchaser under a warranty sale, such lien being strictly between the parties to the joint venture. The contract and bill of sale, being exercises of the same authority to sell and covering property actually constituting joint-venture property at the time, therefore demonstrate that the transaction as a whole was within the scope of the joint venture, the expressed warranty being reasonably necessary to complete the sale in furtherance of the common enterprise and its purposes. The third question is therefore answered in the affirmative.

As to the fourth question, the law is well settled that the "* * * liabilities of joint adventurers are governed, in general by rules which are similar or analogous to those which govern the corresponding * * * liabilities

of partners, except as they are limited by the fact that the scope of a joint adventure is narrower than that of the ordinary partnership. Accordingly, as a general rule, each of several joint adventurers has power to bind the others and to subject them to liability to third persons in matters which are strictly within the scope of the joint enterprise. Thus, a member of a joint adventure can bind his associates, whether disclosed or undisclosed, by such contracts as are reasonably necessary to carry on the venture." (30 Am. Jur., §41, p. 699.) This is particularly true where a joint adventurer is not expressly forbidden to sell within the joint-venture purpose of selling or has been given authority to do so by necessary implication as in this case. Each member of a joint venture acts individually and as agent for other members within the general scope of the enterprise or in furtherance of the business in which they are engaged. Being closely akin to a partnership, the law of partnership and principal and agent underlies the conduct of the venture and governs the rights and liabilities of the joint venture, and of third parties as well. Generally, one adventurer is empowered to sell and convey property involved in the joint venture, if such sale is not expressly prohibited and is in furtherance of the purposes of the joint enterprise. (See Dobbins v. Texas Co., 136 Okla. 40, 275 Pac. 643; Bond v. O'Donnell, 205 Ia. 902, 218 N. W. 898; Federal Underwriters Exchange v. Coker, [Tex. Civ. App., 1938], 116 S. W. [2d] 922; Proctor, *et al.* v. Hearne, 100 Fla. 1180, 131 So. 173; Renig v. Nelson, 199 Wis. 482, 227 N. W. 14.)

The obligations of sale, delivery and warranty incurred in the case at bar as to 1500 tons of cast-iron scrap obviously related to matters strictly within the scope of the

joint venture to sell scrap iron and were reasonably necessary to carry on the venture in furtherance of the common enterprise. In fact, they fulfilled the very purpose for which the venture was created. That these obligations were binding on the respondent corporation and on the respondent copartnership as joint adventurers is irrefutable under the principles above enunciated and under all the equities of the case. The fourth question is therefore answered in the affirmative.

It is no defense to say that the respondent copartnership was undisclosed or that the respondent corporation purported to sell its own property and the petitioner purchased on that assumption without knowledge of the joint venture, the test being that the sale was within the scope and authority of the joint venture as well as in furtherance of the business in which the joint adventurers were engaged. (See Proctor v. Hearne, *supra.*) Neither can the respondent copartnership avoid liability because it had no actual knowledge of the sale at the time it was made, the knowledge of one joint adventurer acting within the scope and authority of the joint venture being the knowledge of all and what would bind the one would bind the others. (See Robertson v. Merwin, 139 N. Y. S. 726.) Nor can it do so because the respondent corporation secretly pocketed the partial payment of $35,000 on executing the sale and the respondent copartnership received no benefit therefrom, it having the right to share therein upon an accounting with its coadventurer as well as in the final payment of $40,000 on delivery of the entire 1500 tons of cast-iron scrap sold had the contract been fully performed. (See Driver v. Brunemar, 40 App. Cas. [D. C.] 105; Selwin & Co. v. Waller, 142 N. Y. S.

1052; Reyer v. Blaisdell, 26 Colo. App. 387, 143 Pac. 385; Perry v. Morrison, 118 Okla. 212, 247 Pac. 1004.)

The written agreement for sale and delivery and supporting bill of sale are thus binding upon the respondent copartnership to the same extent as they are on the respondent corporation, even though respondent corporation may have perpetrated a fraud upon the petitioner and even though the respondent copartnership may be innocent of that fraud. The underlying principle of partnership and principal and agent controls, so that one joint adventurer is liable for the fraud of the other within the scope and authority of the joint venture. Nor are the obligations of sale, delivery and warranty in this case divisible, but in their entirety are binding obligations upon both parties to the joint enterprise.

The undisputed evidence proves that the respondents corporation and copartnership are in total breach of all the terms of contract. Admittedly, the respondent corporation was insolvent at the time of suit and is now a bankrupt. It never had any intention of complying with any of those terms. Nor did the respondent copartnership ever have any intention of doing so. On the contrary, both respondents, in conjunction with the other respondents as their agents, before and at the time of suit were acting in defraud of the petitioner by intentionally misapplying and converting whatever cast-iron scrap was property of the joint venture and subject to sale by one coadventurer and did so in contravention of the contractual rights and title of the petitioner. Indeed, the cast-iron scrap originally located at Waimea was lost at sea while being so misapplied and converted before suit. The cast-iron scrap at Waianae was likewise handled and was

being loaded on a barge by the respondents when restrained at the time of suit. That cast-iron scrap at Waianae would have been a proper subject of equitable relief for injunction and constructive trust in favor of petitioner had not such property been released from the operation of the restraining order, by stipulation of the parties and by a modified restraining order, and sold as a transaction of the joint venture at San Francisco at the rate of $55 per ton, the petitioner filing a bond in the sum of $5000 for costs and damages to the respondents corporation and copartnership, conditioned upon petitioner's failure to sustain its action, and those respondents filing a reciprocal bond signed by the other respondents as agents for them in the sum of $10,000 for costs and damages to the petitioner, conditioned upon its sustaining its action. The bond of those respondents as to damages thus by such mesne proceedings operates in lieu of the equitable relief for injunction and constructive trust. The next step in logical sequence of equitable relief would be to order the respondents to pay petitioner's damages for which they are jointly severally liable. The respondents corporation and copartnership come within that liability for their total breach of contract as parties to the joint venture. The respondent Patterson comes within it because he is personally liable for his fraud and for his furtherance thereof by participating in the misapplication and conversion of such property of which he had control as agent and chief administrative officer of the respondent corporation. (See 3 Fletcher Cyc. Corp. [perm. ed.] §1143, p. 727.) The respondent Meagher comes within it because he is likewise liable for his furtherance of that fraud by also participating in the misapplication and conversion of such property as agent and

sole representative in the Territory of the respondent copartnership, a foreign copartnership, if not its *alter ego* solely responsible for its breach. (See 3 Fletcher Cyc. Corp. [perm. ed.] §§1142, 1143, pp. 726, 727; Tiffany on Agency [2d ed.] §136, pp. 355, 356, 357.) As already indicated, the undisputed evidence, largely adduced by the respondents themselves, proves the case for the petitioner and conclusively establishes the material allegations of the petitioner's bill.

At this juncture it is proper to consider the contention of the respondents that equity has no jurisdiction to entertain the petitioner's cause and that, therefore, the interlocutory decree, in dismissing the bill and in denying equitable relief, should be sustained. In support of that contention the respondents allege that the presiding judge in equity erred in finding, as he did, (1) that the petitioner has no adequate remedy at law, and (2) that the petitioner is entitled to sue in a territorial court upon the warranty agreement for sale of personal property in the Territory and delivery of that property to California because it constitutes a transaction in interstate commerce, irrespective of the fact that the petitioner is a foreign corporation which otherwise may be doing business in the Territory without complying with statutory requirements for such a corporation. The first finding is patently a sound one under all the facts and circumstances of this case inclusive of the allegations in the bill itself. Likewise is the second under the principles enunciated by this court in Cannell & Chaffin v. Deering, 26 Haw. 74. (See Sioux Remedy Co. v. Cope, *et al.*, 235 U. S. 197; Mergenthaler Linotype Co. v. Spokesman Pub. Co., 127 Ore. 196, 270 Pac. 519; Continental Supply Co. v. Hoffman, 144 S. W. [2d] 253, 17 Fletcher Cyc. Corp.

[perm. ed.] §§8415, 8424, pp. 336, 367.) The contention of the respondents is therefore without merit.

The petitioner's specifications of error presenting the material questions, which have been answered in the affirmative herein, are sustained. Accordingly, the interlocutory decree is reversed and the cause remanded below for further proceedings to determine the nature and extent of the appropriate, just and equitable relief to be granted to the petitioner by a final decree in its favor consistent with this opinion.

S. Shapiro (E. Berman with him on the briefs) for appellant.

B. H. Levinson (Levinson & Cobb on the brief) for appellees W. G. Meagher and Industrial Development.

J. O. Hughes for Patterson Construction Co., Ltd. (submitted on his brief). [108]

[Title of Supreme Court and Cause.]

DECISION ON APPEAL

In the above cause, pursuant to the opinion of the above-entitled Court rendered and filed on April 9, 1952, Petitioner's specifications of error presenting the material questions, which have been answered in the affirmative in said opinion, are sustained. Accordingly, the interlocutory decree is reversed and the cause remanded below for further proceedings to determine the nature and extent of the appropriate, just and equitable relief to be granted to the Petitioner by a final decree in its favor consistent with said opinion.

Dated at Honolulu, T. H., this 25th day of April, 1952.

By the Court:

[Seal] /s/ LEOTI V. KRONE,
Clerk.

Approved:

/s/ LOUIS LEBARON,
Associate Justice.

[Endorsed]: Filed April 25, 1952. [109]